

United States
Circuit Court of Appeals
For the Ninth Circuit.

NORTHWESTERN STEVEDORING COM-
PANY, a Corporation, and OCCIDENTAL
INDEMNITY COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner,
Fourteenth Compensation District Under the
LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT, and
MARTIN MATHESON,
Appellees.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

FILED

NOV 19 1929

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

NORTHWESTERN STEVEDORING COM-
PANY, a Corporation, and OCCIDENTAL
INDEMNITY COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner,
Fourteenth Compensation District Under the
LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT, and
MARTIN MATHESON,

Appellees.

Transcript of Record.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Appearance of Attorneys	41
Assignment of Errors	54
Bill of Complaint	2
Certificate of Clerk U. S. District Court to Transcript of Record on Appeal	67
Citation on Appeal	59

EXHIBITS:

Exhibit "A"—Transcript of Testimony at Hearing Before the United States Employees' Compensation Commis- sion, Dated May 29, 1929	5
Exhibit "B"—Transcript of Testimony at Further Hearing Before the United States Employees' Compensation Commission, Dated June 4, 1929.....	25
Exhibit "C"—Compensation Order Award of Compensation in Case No. 31-38...	38
Memorandum Decision on Complainants' Ap- plication for an Interlocutory Stay of Compensation Award	45

Index.	Page
Motion and Affidavit for Interlocutory Injunction	42
Names and Addresses of Attorneys.....	1
Notice of Appeal	58
Notice of Appearance of Attorneys.....	42
Notice of Hearing (July 5, 1929).....	44
Notice of Hearing (July 8, 1929).....	45
Order Allowing Appeal and Fixing Bond.....	53
Order Denying Motion for Interlocutory Injunction	51
Petition for Appeal	52
Praeceptum for Transcript of Record on Appeal.	65
Statement of Evidence to be Included in Record	55
Supersedeas and Cost Bond on Appeal	61

NAMES AND ADDRESSES OF ATTORNEYS.

BOGLE, LAWRENCE, Central Bldg., Seattle,
Washington,

GATES, CASSIUS E., Central Bldg., Seattle,
Washington,

DOBRIN, E. G., Central Bldg., Seattle, Washing-
ton,

Attorneys for Appellants.

LLOYD, WESLEY, Perkins Bldg., Tacoma,
Washington,

SAVAGE, ANTHONY, United States District
Attorney, Seattle, Washington,

McCUTCHEON, JOHN T., Assistant United
States District Attorney, Tacoma, Washington,
Attorneys for Appellees. [1*]

In the District Court of the United States for the
Western District of Washington, Southern
Division.

No. 393.

NORTHWESTERN STEVEDORING COM-
PANY, a Corporation, and OCCIDENTAL
INDEMNITY COMPANY, a Corporation,
Complainants,

vs.

WM. A. MARSHALL, Deputy Commissioner
Fourteenth Compensation District Under

*Page-number appearing at the foot of page of original certified
Transcript of Record.

the LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT, and
MARTIN MATHESON,

Defendants.

BILL OF COMPLAINT.

Come now the complainants and for their bill of complaint against the defendants allege:

I.

That the complainant, Northwestern Stevedoring Company, is now and at all times herein mentioned was a corporation organized and existing under and by virtue of the laws of the State of Washington, and an employer within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

II.

That the complainant, Occidental Indemnity Company, is now and at all times herein mentioned was an insurance company organized as a corporation under and by virtue of the laws of the State of California, and carrier secured by the complainant Northwestern Stevedoring Company, a corporation, in accordance with the provisions of the Longshoremen's and Harbor Workers' Compensation Act.
[2]

III.

That Wm. A. Marshall is now and at all times herein mentioned was the Deputy Commissioner of the Fourteenth Compensation District under the

provisions of the Longshoremen's and Harbor Workers' Compensation Act.

IV.

That the defendant, Martin Matheson, was at the time of receiving the personal injury hereinafter referred to an employee of the complainant, Northwestern Stevedoring Company, a corporation, within the provisions of the Longshoremen's and Harbor Workers' Compensation Act.

V.

That on the 18th day of October, 1928, while on board the steamship "Point Reyes" in the harbor of the city of Tacoma, in the State of Washington, the defendant, Martin Matheson, sustained personal injury, and thereafter a hearing thereon was had pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, before the defendant, Wm. A. Marshall, as said Deputy Commissioner on the 29th day of May, 1929, a transcript thereof being attached hereto, marked Exhibit "A" and made a part hereof, and a subsequent hearing had thereon on the 4th day of June, 1929, a transcript thereof being attached hereto, marked Exhibit "B" and made a part hereof, resulting in a compensation order and award of compensation being filed by the defendant, Wm. A. Marshall as said Deputy Commissioner in his office on June 6, 1929, a copy of which is hereto attached, marked Exhibit "C" and made a part hereof.

VI.

That said compensation order and award of compensation is not in accordance with law and the provisions of the Longshoremen's and Harbor Workers' Compensation Act. [3]

WHEREFORE, complainants pray that said compensation order and award of compensation be suspended and set aside, and the payments of the amounts required by said award stayed, pending final decision herein, and for such other, further or different relief as to the Court may seem equitable and just, together with costs of suit.

BOGLE, BOGLE & GATES,
Solicitors for Complainant.

United States of America,
State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says: That he is the Washington Agent of Occidental Indemnity Company, a corporation, one of the complainants herein. That he has read the bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters which are stated therein to be alleged on information and belief, and as to those matters he believes it to be true.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 2d day of July, 1929.

[Seal]

STANLEY B. LONG,

Notary Public in and for the State of Washington,
Residing at Seattle.

STANLEY B. LONG,

Notary Public, State of Washington.

Commission expires Aug 12, 1932. [4]

EXHIBIT "A."

UNITED STATES EMPLOYEES' COMPEN-
SATION COMMISSION.

Before WM. A. MARSHALL, Deputy Commis-
sioner, Fourteenth Compensation District.

CASE No. 31-38.

MARTIN MATHESON,

Claimant,

vs.

NORTHWESTERN STEVEDORING CO.,

Employer.

OCCIDENTAL INDEMNITY CO.,

Insurance Carrier.

Pursuant to notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employees' Compensation Commission, at Tacoma, Washington, on the 29th day of May, 1929.

APPEARANCES:

The Claimant Appearing in Person.

MATTHEW STAFFORD, Esq., for the Employer
and Insurance Carrier. [5]

The DEPUTY COMMISSIONER.—It is agreed by the parties that the claimant sustained an injury on October 18, 1928, as set forth in the application;

That both the employer and employee were subject to the provisions of the Longshoremen's and Harbor Workers' Compensation Act at the time of the injury;

That the relationship of employer and employee existed at the time of the injury;

That at the time of the injury the claimant was performing services growing out of and incidental to his employment;

That the average annual earnings of the claimant at the time of the injury amounted to the sum of \$1829.54;

That the employer has paid \$563.04 to the claimant as compensation.

This leaves in issue the questions of temporary and permanent disability.

Mr. Matheson, please stand up and be sworn.

MARTIN MATHESON, the claimant, called as a witness in his own behalf, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By the DEPUTY COMMISSIONER.)

Q. Has there been considerable improvement, Mr. Matheson, in your condition from the time of the injury up to April 8th?

A. No. There ain't much of an improvement.

Q. Was there much change in your condition before April 8th—in the month before April 8th—much change?

A. There is not much improvement yet.

Q. There has not been much change yet? [6]

A. No. I will walk around for three or four hours and then I have got to lay off for the rest of it.

Q. For the rest of the day?

A. Yes, sir. And it is the same yet. I can walk for three or four hours and then I have tried to work the next day at home and I have been laid up the next day.

Q. What work were you trying to do?

A. Garden work.

Q. In what way did it bother you?

A. As soon as I twist my leg around or move around with it, I cannot do nothing after that.

It hurts me. Going downstairs or down a hill it hurts.

Q. How far are you able to walk?

A. Oh, I can walk three or four blocks, and if I have got a cane I can walk a quarter of a mile.

Q. Is that about the limit?

A. That is the limit that I can stand on my leg.

Q. What happens then?

A. Well, I cannot do no more.

Q. Why?

A. Because the leg is too sore. It swells up. The knee is swollen up. I cannot walk around now without having a bandage on it.

Q. Stand up, Martin, please so that we can see it. Is the leg swollen now?

A. No, it ain't swollen now—not much. A little bit. You can feel it.

Q. What sort of a bandage have you got on it?

A. An elastic bandage.

Q. Furnished by the doctor? [7]

A. Yes, sir, by Dr. Heaton.

The DEPUTY COMMISSIONER.—You may take him, Mr. Stafford.

Cross-examination.

(By Mr. STAFFORD.)

Q. Martin, how long between the time you were hurt—how long was it after you were hurt that you first started to walk around? How long were you laid up altogether?

A. I was laid up for a week and then I went to

work again. I was laid up for a week and then I went to work on Friday of the next week, and then I worked three or four days, I think—I don't remember just exactly. Somewheres in there, but I told the doctor about my—

Q. (Interrupting.) I understand that, Martin, but I mean from the time that you laid off work, how long was it before you started to walk again?

A. A week.

Q. And then you went back to work and you were laid up again later? A. Yes, sir.

Q. And how long after that was it that you walked around?

A. I walked around until they put a cast on me and then I was on crutches.

Q. How long were you in the cast?

A. Well, I don't know. About three or four weeks.

Dr. HEATON.—Just about a month that he was in a cast.

Q. Then after the cast was taken off did you start to walk on your leg right away? A. No.

Q. How long after that did you start to walk on it? [8] A. That I cannot tell you.

Q. Can you give us any idea?

A. No, I cannot, because I was laid up at home all the time with my leg up on a chair.

Q. You were laid up at home with your leg on a chair? A. Yes, sir.

Q. Did you have your leg up on a chair for a period of months?

A. Pretty nearly two months.

Q. Without stepping on it at all?

A. Oh, I just stepped on it, yes.

Q. Just a little bit? A. Yes, sir.

Q. But you did not walk any blocks or anything like that, did you? A. No, sir.

Q. When you did walk you walked on crutches, did you not, Martin? A. Yes, sir.

Q. How long has it been since you have been walking around on it?

A. I cannot say how long.

Q. Not long? A. I cannot say how long.

Q. Were you walking around at Christmas-time?

A. Christmas-time?

Q. Yes.

A. No. Christmas-time I was home and I didn't walk at all. I didn't walk or work.

Mr. STAFFORD.—That is all.

The DEPUTY COMMISSIONER.—That is all.
[9]

(Witness excused.)

Dr. R. C. SCHAEFFER, called as a witness on behalf of the employer and insurance carrier, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By Mr. STAFFORD.)

Q. What is your name, Doctor?

A. R. C. Schaeffer.

Q. And you are a practicing physician in the State of Washington, Doctor? A. Yes, sir.

Q. Where did you prepare for practice?

A. At the University of Michigan.

Q. When? A. 1908.

Q. You graduated in 1908? A. Yes, sir.

Q. And you are duly licensed and admitted to practice in this state? A. Yes, sir.

Q. How long have you been practicing here?

A. Twenty years.

Q. And you have examined Mr. Matheson?

A. Yes, sir.

Q. Just state with particular reference to the—I believe the right knee—what your findings were?

A. I examined him on December 6, 1928. His injury was on October 18th. That was about six weeks after the injury. He is a man sixty years old. Teeth very bad. Pyorrhea and infection of mouth. He walks normally and without a limp, although [10] he is somewhat knock-kneed on the right side. The right knee shows no swelling and no external evidence of injury. He complains of marked tenderness at the attachment of the external lateral ligament into the head of the tibia. He states that all his pain is at this point. Pressure at this point causes pain.

An X-ray examination shows a lessening of the articular space in the outer portion of the right knee-joint. There is some change in the external semilunar cartilage. A stereoscopic X-ray of this knee made by Dr. R. D. MacRae, roetenologist shows a beginning calcification of the external semilunar

cartilage. There is a spur on the outer aspect of the head of the right fibula. There is exostotic growth at the attachment of the patellar ligament to the tibial tubercle. In other words, that was evidence of a chronic articular rheumatism. An X-ray of the left knee does not show the same bony changes.

Q. Now, this calcification of the external semi-lunar cartilage, is that the result of an injury or is there merely evidence of the progressiveness of an arthritis?

A. An injury may precipitate arthritis in a joint, but in this particular case our X-rays were taken about six weeks after the accident and very advanced bony changes were found.

Q. Could these changes have taken place within the six weeks from the time that the injury had been received.

A. They could not have taken place in anywhere near six weeks at all.

Q. As a result of what injury he suffered?

A. No. These were calcified changes. They were bony formations and some of those bony formations—one of those is right at the insertion of the patellar tendon—at a place where there was no soreness whatever. [11]

Q. What evidence of injury did you find, Doctor?

A. The symptoms are purely subjective.

Q. Was there anything demonstrable that would indicate injury?

A. Tenderness to pressure at the points indicated.

Q. Was the arthritic condition sufficiently advanced to indicate a prognosis of permanent disability? A. Yes, sir. He has a bad knee.

Q. Well, of course, at that time his condition, at least as far as the injury was concerned, had not become fixed. Would it be possible, from your examination of him at that time, to estimate the permanent partial disability, even roughly?

A. You mean of the knee as it is?

Q. Yes. You—from your examination of him on December 6th. Could you even roughly estimate—

A. (Interrupting.) Well, offhand, I should say that the disability of that knee at the time that I examined it was probably about ten per cent. That includes arthritis and everything else.

Q. Whether or not that would be the same now, could you state?

A. No, I cannot state that for I have not examined him since.

Q. But the disability, regardless of what the extent of it was, I understand you to say, was unquestionably attributable to this arthritis which was indicated by the bony changes? A. Yes, sir.

Mr. STAFFORD.—That is all.

Cross-examination.

(By the DEPUTY COMMISSIONER.)

Q. Now, on what basis, Doctor, or on what facts could you [12] base your prognosis that he would

have had a disabled knee if the accident had not occurred?

A. Just on the X-ray findings. He has bony outgrowths on that knee that indicate a past trouble and a previous foot trouble. You see, he has such an extensive calcification of the external semilunar cartilage that it has made him knock-kneed. It has thrown his knee in and his foot out. He is going to get a flat foot eventually.

Q. With that condition of knock-knee—did that condition exist at the time of the injury?

A. It probably did, yes. That is the thinning that comes on slowly and the thinning of this cartilage let down this part of the joint and spread this one (indicating), you see.

Q. With that condition was that knee particularly susceptible to being aggravated by injury?

A. Oh, you bet.

Q. Doctor, on the basis of your examination what is your opinion as to there being any injury to the external lateral ligament of the knee and to its attached external cartilage?

A. Well, I think probably there may have been some injury there at that time, to both the internal and the external.

Q. And would not that condition probably aggravate the arthritic condition? A. Yes, sir.

Q. Do the conditions indicate in your judgment that it might be necessary to reset the cartilage?

A. If that was the only change in the knee, I would say remove the cartilage, but he has so many

extensive bond changes that I hesitate to advise any surgery.

Q. Do you feel that the disability—that the disability [13] in this man's knee now is not greater than ten per cent?

A. I don't know now. When I examined him, my impression at that time was somewhere between ten and fifteen per cent. That was just an offhand guess. These things are apt to advance—the arthritic changes are apt to advance and disability increase.

The DEPUTY COMMISSIONER.—I think that is all.

Mr. STAFFORD.—That is all, Doctor.

(Witness excused.)

Dr. A. B. HEATON, called as a witness on behalf of the employer and insurance carrier, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By Mr. STAFFORD.)

Q. Your name, Doctor? A. Dr. A. B. Heaton.

Q. And you practice in Tacoma? A. Yes, sir.

Q. Where did you prepare for the practice of medicine, Doctor? A. Colorado University.

Q. Colorado University? A. Yes, sir.

Q. And how long have you been practicing?

A. About 13 years.

Q. You have been, of course, duly admitted and licensed to practice in the State of Washington?

A. Yes, sir. [14]

Q. Does your practice tend to occupy the major part of your time with any particular kind of work, Doctor? A. Yes, sir.

Q. What kind of work?

A. Now it is mostly women—obstretics, but I was with the Tod Shipyards for two years.

Q. How long ago was that, Doctor?

A. That was from 1917 to 1919.

Q. 1917 and 1919?

A. 1917, 1918 and 1919; approximately two years.

Q. You did practice for those two years?

A. Approximately two years.

Q. And they were two consecutive years?

A. Oh, yes.

Q. Where was that—in Tacoma?

A. Yes, sir.

Q. What was your position with the shipyards, Doctor?

A. I had charge of the hospital on the grounds.

Q. Giving emergency relief?

A. Emergency relief and then follow up work too. The last eight months I was located, too, with Drs. Schaeffer and Hicks.

Q. What year did you graduate in, Doctor?

A. 1914.

Q. I thought you said that you practiced for thirteen years, didn't you?

A. Yes, sir. I had pretty nearly two years of interne work and that took me up to 1916.

Q. And you entered into the practice of medicine then in 1916? A. Yes, sir. [15]

Q. You have taken care of Mr. Matheson for how long, Doctor?

A. Oh, off and on for seven or eight years at least. That is, he and his family.

Q. I mean this particular case.

A. Oh, this particular case?

Q. Now, you say that you have taken care of him and his family for seven or eight years?

A. Yes, sir.

Q. Who in his family? A. His wife.

Q. Any children? A. No.

Q. You have taken care of Mr. Matheson in this particular case, too, have you? A. Yes, sir.

Q. State what your original findings were and what, if any changes you noticed in those findings, if you please.

A. On the start, of course, as he said—the first time he called me up on the telephone and told me he had sprained his knee, and I told him to give his knee a rest and apply linament and hot packs.

Q. Did you see him at that time? A. No, sir.

Q. How long after that phone call was it that you first saw him? A. Oh, probably ten days.

Q. What did your first examination disclose, if you recall, Doctor?

A. It showed tenderness on both sides of the knee—the right knee especially, over the lower part of the knee on the [16] right side, and then the internal lateral surface of the knee.

Q. Did you take any X-ray pictures at that time, Doctor?

A. No, there were not any X-ray pictures taken at that time.

Q. When were the first X-rays taken?

A. I have forgotten exactly when that was. I did not bring the notes here. As a matter of fact—I think the former testimony said six weeks or so. I didn't take any X-rays at all.

Q. You never ordered any X-rays?

A. No. The only X-ray taken was the one that has been referred to previously.

Q. You mean referred to by Dr. Schaeffer?

A. Yes, sir.

Q. Have you examined that X-ray?

A. Yes, sir.

Q. State your conclusions from seeing that.

A. The semilunar cartilage was flattened—thin—and showed calcification changes, and also calcification changes on the ends of the tibia.

Q. By "calcification" just what do you mean, Doctor? A. I mean enlarged bony growths.

Q. Does the flattening of the cartilage show in the X-ray?

A. Yes, sir. That is an external cartilage.

Q. Is there any calcification of either of those cartilages indicated? A. Yes.

Q. In your opinion are these bony changes and the calcification of these cartilages due to the injury or due to any other cause?

A. They were there evidently previous to the injury. [17]

Q. Which?

A. The bony changes. I mean those calcification changes.

Q. Were they extensive or of a minor degree?

A. They were more or less extensive.

Q. Throughout the knee-joint?

A. Yes. As was stated. In the cartilage and the edges of the bone ends.

Q. How would you account for those changes, Doctor?

A. Those are arthritic changes, probably from long standing infection.

Q. Have you ever had occasion to treat Mr. Matheson for any disease that could result in this infection? A. No, sir.

Q. Have you ever had occasion to treat Mr. Matheson for any disease that could result in this infection? A. No, sir.

Q. Have you ever had occasion to observe the condition of his teeth or his tonsils? A. Yes, sir.

Q. What would you say as to the condition of his teeth?

A. His teeth are quite bad and his gums are quite infected.

Q. When did you examine him as to those?

A. When I examined the knee.

Q. That was the first time you ever had occasion to examine them? A. Yes, sir.

Q. When was the last time, prior to this injury, that you did any service for Mr. Matheson?

A. Nothing very particular. Just an occasional cold and that sort of thing.

Q. What is the cause of Mr. Matheson's disability? His [18] present disability?

A. Well, it is a combination in my estimation of both the previous condition and the injury.

Q. What causes you to say that it is the result in any degree of the injury?

A. Because it has been—because the date of his disability and his inability to keep going for any length of time has dated from that injury.

Q. I mean, Doctor, not from his statements to you, but from your findings, what causes you to say that? A. Nothing. I cannot say.

Q. On the other hand, what causes you to say that the present disability is the result of these bony changes?

A. Because they are visible by X-ray.

Q. Could you, with any sound science, attempt to segregate the extent of the disability that is caused by the bony changes from the extent of the disability that is caused by the injury?

A. I don't believe so.

Mr. STAFFORD.—That is all.

Cross-examination.

(By the DEPUTY COMMISSIONER.)

Q. Would a knee in the condition you found Mr. Matheson's knee to be, be particularly susceptible—would the condition be particularly susceptible to aggravation or acceleration by reason of an injury?

A. Very much so.

Q. And if it were a fact that the man had been so employed during the preceding year so as to enable

him to earn \$1829, and he had an injury, even with this pre-existing condition is there any ground or any fair basis upon which a conclusion [19] could be based that he would have had a disability since the date of the injury had it not been for the injury?

A. That is hard—it is hard to do that. We know that he was working steadily, and my knowledge of Mr. Matheson had lead me to believe to a large degree that the disability in his work was due to his injury.

Q. What in your opinion is the percentage of the disability of that knee at the present time?

A. Well, as to carrying on his work—

Q. (Interrupting.) No, considering the full function of the knee at 100%?

A. Oh, I should say 30 or 40 per cent at least—possibly more. You mean, as regards—

Q. (Interrupting.) As regards his ability to use that knee now.

A. At least that much because I know that he cannot use it very long at a time.

The DEPUTY COMMISSIONER.—That is all.
[20]

Redirect Examination.

(By Mr. STAFFORD.)

Q. Doctor, also knowing Mr. Matheson as you do, would you say that it was mostly attributable to the injury? A. No, I didn't say that, Mr. Stafford.

Q. I thought that you did. Now, with reference to your statement, Doctor, the conclusion stated in

that is not based on any findings that you yourself made as a physician, is it?

A. As a physician, yes. General as well as locally.

Q. All right.

A. But as far as locally is concerned, you cannot base that—I could not say that, no.

Q. Now, let us get it straight. Is it based on any local findings? A. No.

Q. What general findings is it based on?

A. Just my knowledge of the man and observing him when he did not know that he was being observed—going down the street, for instance.

Q. State some of those observations?

A. In going down the street—after he has rested a little while—for instance, in the office or where he has been standing talking, when he starts off he starts off pretty bravely, but by the time that he has gone a block he is limping.

Q. What causes you to concluded from that that it is the result of the injury?

A. Because he did not do that beforehand.

Q. When did you last see him before?

A. I have seen him off and on—he used to come up to the office and chew the fat around and come up and tell me about [21] his wife. She had a lot of gall bladder trouble, and so forth, and he never acted that way before.

Q. Had you ever had occasion to examine him before?

A. Not particularly. I have noticed that he has always walked kind of knock-kneed.

Q. During the last seven or eight years?

A. Yes, sir.

Q. How do you get at your 30 to 40 per cent disability rating, Doctor?

A. Due to the fact that he could not do more than that amount of work without going bad.

Q. As I understand it—what do you mean by 30 to 40 per cent? 30 to 40 per cent of what?

A. Of a day's work.

Q. That is not what we are looking for here. We are looking at 30 to 40 per cent, figuring the normal function of the knee as 100 per cent.

The DEPUTY COMMISSIONER.—Of the leg.

Mr. STAFFORD.—Yes, of the leg as 100 per cent.

Q. Now, how do you arrive at the conclusion that Mr. Matheson is disabled 30 to 40 per cent in the functioning of this leg?

A. He has 100 per cent of the leg for a little while, but it does not last.

Q. Well, what findings can you point to that would justify this conclusion?

A. Just simply the—how long it takes him to play out. That is all.

Mr. STAFFORD.—That is all.

The DEPUTY COMMISSIONER.—That is all.

(Witness excused.) [22]

Mr. STAFFORD.—Now, before this hearing terminates, Mr. Marshall, I wish to make two—shall we call them motions? The first is, that we be permitted to present authorities generally and par-

ticularly under section 8, subsection (f) (2) The second motion is that we adjourn the hearing to Seattle to make it possible to take the oral testimony of Drs. Rodger Anderson and Buckner, we agreeing as carriers to pay Mr. Matheson's entire expense so that he will be able to attend this hearing at your office.

I make these motions because the principle involved here is one of serious import and touches on the administration of the act generally.

The DEPUTY COMMISSIONER.—You have no objection to having a hearing over at Seattle, you getting your expenses paid to go over there?

The CLAIMANT.—I have done everything that you have wanted me to go. Now it has been seven weeks that has been going on since you people stopped my pay. I cannot live on wind, and I am not able to work and you have stopped my pay, and I have got a wife to take care of.

The DEPUTY COMMISSIONER.—Your expenses will be paid, Mr. Matheson.

The CLAIMANT.—What am I going to get when I get there? I owe everybody now.

The DEPUTY COMMISSIONER.—They will take care of that.

Mr. STAFFORD.—I will mail the expenses to Mr. Matheson in advance.

The CLAIMANT.—You people have stopped my compensation, and I am crippled and I cannot work longshoring. [23]

The DEPUTY COMMISSIONER.—The hearing will be continued until Tuesday, June 24, 1929,

at Seattle, at the office of the Deputy Commissioner.
452 Colman Block, at 5:30 P. M.

Mr. STAFFORD.—And I will have a check to Mr. Matheson before that time.

I hereby certify that the above and foregoing is a true and accurate transcript of my shorthand notes in the above-entitled matter, taken under the direction of the Deputy Commissioner.

(Signed) E. E. LESCHER. [24]

EXHIBIT "B."

UNITED STATES EMPLOYEES' COMPEN-
SATION COMMISSION.

Before WM. A. MARSHALL, Deputy Commis-
sioner, Fourteenth Compensation District.

#31-38.

MARTIN MATHESON,

Claimant,

vs.

NORTHWESTERN STEVEDORING CO.,

Employer.

OCCIDENTAL INDEMNITY CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT FUR-
THER HEARING.

Pursuant to oral notice, this matter was heard before Wm. A. Marshall, Deputy Commissioner, United States Employees' Compensation Commis-

sion, at Seattle, Washington, on the 4th day of June, 1929.

APPEARANCES:

The Claimant Appearing in Person.

MATTHEW STAFFORD, Esq., Appearing for Employer and Insurance Carrier. [25]

Dr. H. T. BUCKNER, called as a witness on behalf of the employer and insurance carrier, and after having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By Mr. STAFFORD.)

Q. Doctor Buckner, you are a practicing physician in the state of Washington?

A. Yes, sir.

Q. Where did you study medicine?

A. I graduated from Jefferson Medical College, Philadelphia, Pennsylvania.

Q. You are regularly licensed and admitted to practice in the State of Washington?

A. Yes, sir.

Q. How many years have you practiced altogether? A. Sixteen years.

Q. Does your practice take on the form of a specialty in any particular line? A. Yes, sir.

Q. What is that specialty?

A. Bone and joint surgery.

Q. Did you, Doctor, on March 8, have occasion

to examine Martin Matheson, the gentleman sitting at your right? A. Yes, sir.

Q. State what your findings were.

A. Well—

Q. (Interrupting.) With particular reference to the right knee-joint, Doctor. [26]

A. Well, according to the examination, well nourished and well developed. Head: Eyes negative. Teeth show marked pyorrhea. Throat red and injected. Chest: Heart and lungs normal. Abdomen normal. Back: Spine is straight; can execute all motions normally; no muscle spasm. No evidence of injury to the back. Extremities: Both legs are the same length. Reflexes are normal. Sensation normal. There are many varicose veins of both legs with marked brownish discoloration which usually accompanies such conditions. Has marked flattening of both feet, both longitudinal and transverse arches. There is also some pronation of both feet. Right knee: There is a slight knock-knee tendency with some slight limitation in flexion and extension. There is a slight lateral instability. Attempted movement to obtain complete extension causes severe pain. The patella freely movable. There is no effusion. There is no thickening of the periarticular structures. There is some tenderness on the inner side of the knee in the region of the internal lateral ligament. There is no tenderness along the attachment of the internal semilunar cartilage.

Q. Did you take an X-ray of his knee, Doctor?

A. Yes, sir.

Q. What condition did it show?

A. It showed no evidence of any fracture. He had a marked lipping, indicate of an osteo-arthritis.

Q. You say that this indication of an osteo-arthritis was marked? A. Yes, sir.

Q. What evidence of disability caused by injury did you find, Doctor?

A. He sustained an injury to the internal lateral ligament. [27]

Q. Is that what is commonly known as a sprain of the knee, Doctor? A. Yes, sir.

Q. What would you estimate the extent of Mr. Matheson's permanent partial disability, *relating this* disability to the right knee-joint, and considering the normal function of that knee-joint as 100 per cent, what would you consider to be Mr. Matheson's permanent partial disability directly resulting from this accident?

A. Well, I would estimate his relaxation of the knee to be about ten per cent—that is, of the internal lateral ligament.

Q. If the bony changes which you found so marked in Mr. Matheson's knee from the X-rays had never been affected by the injury, was the condition sufficiently progressive so that it would in your opinion ultimately disable him?

A. Yes, it would.

Q. If there had been no arthritis present in this knee, was there any finding to indicate any circumstances resulting from the injury which

would keep him from recovering as the normal sprain of a knee would recover?

A. No, if he did not have any arthritis in his knee I should think that he would make an ordinary recovery. He might have some relation of the lateral ligament.

Mr. STAFFORD.—That is all.

Cross-examination.

(By the DEPUTY COMMISSIONER.)

Q. Doctor, on what basis do you base your prognosis that he would have a disabled knee because of the arthritis? Is that a general statement or are you able to say that at any definite time he would become disabled?

A. No, he is a man past 63. His period of doing hard [28] work is past. Bony changes normally appear in the bone in and about the joints. He has a degree of focal infection, of marked pyorrhea and a red and injected throat, which is an indication of infection and arthritic bony changes of that type are more or less a progressive disease, anyway.

Q. Yes, but we have herein the evidence, Doctor, testimony to the effect that this workman earned between \$1800 and \$1900 during the preceding year.

A. I know, but at the same time the condition might have been accelerated to a certain extent by that.

Q. Isn't it entirely probably, Doctor, that an in-

jury such as this could have lightened up or aggravated his pre-existing condition?

A. It probably aggravated it or accelerated the condition to a certain extent, yes.

Q. In other words, if I might put it this way, would not a knee in that condition be particularly susceptible to injury?

A. Oh, yes, I should say that.

Q. With regard to this injury to the internal lateral ligament, in your judgment is any surgical operation indicated, Doctor? A. No, sir.

Q. Under the circumstances? A. No, sir.

Q. What in your judgment, Doctor, is the total disability of that knee at the present time irrespective of the cause of the disability, using the full function of the knee as one hundred per cent?

A. The disability of the knee?

Q. The entire disability of the knee, from whatever cause.

A. Oh, from different causes—that is, even though he [29] has a disease of the joint?

A. Yes.

A. Why, I should not think that he has more than 15% or 20% at the very maximum of the disability of the knee.

Q. Even with the arthritic condition?

A. Yes, sir. He should be able to do—I know of others with the disease who do light work and get around and do many things.

The DEPUTY COMMISSIONER.—I think that is all then.

Mr. STAFFORD.—That is all.

(Witness excused.)

Dr. ROGER ANDERSON, called as a witness on behalf of the claimant, and having been first duly sworn by the Deputy Commissioner, was examined and testified as follows:

Direct Examination.

(By the DEPUTY COMMISSIONER.)

Q. Doctor, you are a regularly licensed and practicing physical and surgeon here in Seattle?

A. Yes, sir.

Q. Did you examine Martin Matheson at my request some time ago? A. Yes, sir.

Q. What condition did you find there, Doctor, with regard to an injury that occurred to his right knee?

A. May I take just a second to read this report over because I did not have time to read it before?

Q. Yes, that is all right. Now, Doctor, having read that report over, you found at the time of your examination that there was a hypertrophic osteo-arthritis, and you also stated from the [30] description of the accident, "This one change could readily result in an injury to the external lateral ligament and to its attached external cartilage," and that the injury had also aggravated his pre-existing arthritis? A. Yes, sir.

Q. Now, Doctor, coming back to the heart of

this situation. In your estimate here of 15% of disability, does that include the total disability that might exist—that exists now in Mr. Matheson's right knee from whatever cause. That is stating the question differently. We have a workman here who has earned between \$1800 and \$1900 within the preceding year. The testimony is that he was not troubled with the knee before. He now says that he is disabled. We have the testimony of arthritis and an admission on the part of all the physicians that an injury of this character would probably aggravate any pre-existing arthritis condition. Now, the thing that I am desiring to learn—that I am desiring to ascertain in your judgment as to what the total disability of the knee is now by that arthritis—whether it be from arthritis or from an aggravation of the arthritis by reason of injury and the disability from the injury too.

A. In my opinion—I examined him on the 12th of April, 1929, and my opinion is that there was at least 35 to 45 per cent of disability in regard to the function of his right leg taken as a whole for his heavy previous duty of longshoring, both as a result—that is, the disability is both the result of his existing arthritis and of his injury.

Q. The leg, in the condition in which this right leg of Mr. Matheson was at the time of the injury, was one that is particularly susceptible to injury?

A. Yes, sir.

Q. Is there any way definitely to determine that

had it [31] not been for the injury he would have been disabled at any particular time or at any certain time in the future?

A. Will you repeat that, please?

Q. Is there any way to determine with any degree of certainty that had not the accident occurred he would have been disabled because of his arthritis alone in the future—at any particular time?

A. It is unable to state to my knowledge from any method as to when he would be disabled, but I could add as a qualifying statement to that that usually if arthritis is in one knee it is in the other knee, I think, too concurrently in regard to symptoms.

Q. Was there any examination made to ascertain whether the other knee had an arthritic condition in this case? I have had no testimony of that so far from any of the physicians.

Mr. STAFFORD.—There is testimony by Dr. Schaffer to the effect that the left knee did not show the same bony changes.

Q. Just for your information, Doctor, Dr. Schaffer, the physician who attended him, says that there were no bony changes in the other knee.

Mr. STAFFORD.—The X-ray shows that.

The DEPUTY COMMISSIONER.—You can question the doctor, Mr. Stafford.

Cross-examination.

(By Mr. STAFFORD.)

Q. Dr. Anderson, in your report to Mr. Mar-

shall, dated April 12, 1929, did you not state that in your opinion there will be a 15% per cent permanent partial disability of the functions of the right knee? A. Yes. [32]

Q. How do you reconcile that statement with your statement to-day of 35 to 45% disability?

A. The statement that I made to-day is at the time that I examined him, both as a result of the accident and of the disease. At that date there was that amount, at that time, for hard work.

Q. Well, then, what does the 15%—pardon me, if you want to continue your answer.

A. And in any event, regardless of how much recovery there will be, later on as he gets back to work and as he gets used to it, there will be a residual 15% disability.

Q. Then it was your opinion at the time that you examined him that he was not in a fixed condition?

A. I believe I stated before, "A period of six months has now elapsed since his accident and I believe he can now safely attempt to return to work if he is capable to continue." There was some doubt in my mind, you see, whether he would be able to continue, but he should give it an honest attempt. So that shows that there is some doubt in my mind as to whether at that time he was entirely recovered.

Q. Well, Doctor, do you think that a man could safely attempt to return to work if he was suffering from 35% to 45% disability of a knee?

A. Yes.

Q. For longshore work?

A. Yes. As a matter of attempting it at that time. I think that he is going to get better. If he gradually goes to work and limbers it up, he will get better. I have cases of knees which, so far as the function of the leg goes, they are working now—in private work for themselves, and they have in my opinion 50% disability as compared to a full, healthy adult, as far [33] as that leg goes, but they are able to carry on. What were you, a hatch-tender, Mr. Matheson?

The CLAIMANT.—I was hatch-tender at the time.

The WITNESS.—It makes some difference in my opinion as to what these men do. Now, a hatch-tender, he can return to that work with his leg off sometimes.

The CLAIMANT.—Provided I sit down and tend hatch.

The WITNESS.—Yes. Of course there are different types.

Q. Now, Doctor, you say that 35 to 45% disability existed at the time that you examined him, and that there was some prospect of his condition improving. Is that correct?

A. Yes.

Q. What in your opinion would be the ultimate degree of permanent partial disability which would result directly from the accident?

A. Well, I would say that it would be approximately 15% as the result of the accident. That is

the intention of that sentence that was not completed. I should add that to that sentence.

Mr. STAFFORD.—That is all.

Redirect Examination.

(By the DEPUTY COMMISSIONER.)

Q. Doctor, in your opinion is this man's condition practically stationary, or will his condition improve?

A. I think that as of the time of April 12 he will improve.

Q. Then April 12 was not the proper time to estimate his permanent disability in your judgment—finally? A. Finally?

Q. Yes.

A. I think there will be some improvement and if he is [34] able to go back to work we would more definitely be able to determine the eventual disability.

Q. Irrespective of the cause of the disability will 15% be the total disability that this man will probably have, irrespective of the cause of the disability?

A. No. He may have a greater disability than that, and it is the history of these cases that following injury, contrary to what I said before, occasionally the injury stirs up the arthritis and they gradually or occasionally quickly get worse. The arthritis itself.

The DEPUTY COMMISSIONER.—That is all.

Recross-examination.

(By Mr. STAFFORD.)

Q. But at the time that you examined him, Doctor, on April 12, *if* was your opinion, as I understand you to say a while ago, that the degree of permanent partial disability then apparent and directly attributable to the injury was about 15%?

A. It was my opinion that as a result of the accident there would be a 15% permanent partial disability of this leg.

Mr. STAFFORD.—That is all.

The DEPUTY COMMISSIONER.—If it is conceded that an injury to that leg with the pre-existing arthritic condition has resulted in increasing or accelerating or aggravating the arthritic condition, then the 15% would not be a true estimate, is that right, Doctor?

The WITNESS.—Yes. In some cases it would not be enough because it aggravates them, but not in all cases does the injury aggravate them.

The DEPUTY COMMISSIONER.—That is all.

(Witness excused.)

The DEPUTY COMMISSIONER.—With that the hearing is concluded. [35]

I hereby certify that the above and foregoing is a true and accurate transcript of my shorthand notes taken in the above-entitled matter under the direction of the Deputy Commissioner.

E. E. LESCHER. [36]

EXHIBIT "C."

United States Employee's Compensation Commission,
Fourteenth Compensation District.

CASE No. 31-38.

In the Matter of the Claim for Compensation Under
the LONGSHOREMEN'S AND HARBOR
WORKERS' COMPENSATION ACT.

MARTIN MATHESON,

Claimant,

Against

NORTHWESTERN STEVEDORING COMPANY,
PANY,

Employer.

OCCIDENTAL INDEMNITY COMPANY,
Insurance Carrier.

COMPENSATION ORDER AWARD OF COM-
PENSATION.

Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law,

The Deputy Commissioner makes the following

FINDINGS OF FACT.

That on the 18th day of October, 1928, the claimant above named was in the employ of the employer above named at Tacoma in the State of Washing-

ton, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Occidental Indemnity Company; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship "Point Reyes," said steamship being then situated [37] at Tacoma, in the State of Washington; that while the claimant above named was so employed he stepped between some loose dunnage and the hatch coaming, wrenching his knee and resulting in his disability; that notice of injury was given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$1,839.54; that as a result of the injury sustained the claimant was wholly disabled from October 20, 1928, to April 12, 1929, inclusive, except for five days during which he continued his employment; that as a result of his injury claimant has a permanent partial disability equivalent to 40% of such disability as he would have sustained if he had lost his right leg, for which he is entitled to 115.2 weeks compensa-

tion; that the employer has paid \$563.04 to claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD.

That the employer, Northwestern Stevedoring Company, and the Insurance Carrier, Occidental Indemnity Company, shall pay to the claimant compensation as follows: 115.2 weeks at \$23.46 per week, amounting to the sum of \$2,702.59; that there is now due and payable to the claimant 33 weeks compensation at \$23.46 per week, amounting to the sum of \$774.18, and covering the period from October 18, 1928, to June 5, 1929, inclusive; that the employer shall have credit for \$563.04 previously paid to claimant as compensation; that the remainder of compensation shall be paid to claimant bi-weekly.

Given under my hand at Seattle, Washington, this 6th day of June, 1929.

WM. A. MARSHALL,
Deputy Commissioner, Fourteenth Compensation
District. [38]

PROOF OF SERVICE.

I hereby certify that a copy of the foregoing Compensation Order was sent by registered mail to the Claimant, the Employer and The Insurance Carrier at the last known address of each as follows:

Martin Matheson, c/o Geo. Smith, International Longshoremen's Association, 1353 Commerce St., Tacoma, Washington.

Northwestern Stevedoring Company, 201 Central Bldg., Seattle, Washington.

Occidental Indemnity Company, c/o Matthew Stafford, 501 Colman Bldg., Seattle, Wash.

WM. A. MARSHALL,
Deputy Commissioner.

Mailed June 6, 1929.

[Endorsed]: Complaint with Exhibits, etc. Filed in the United States District Court, Western District of Washington, Southern Division, Jul. 2, 1929. Ed. M. Lakin, Clerk. By E. Redmayne, Deputy.
[39]

APPEARANCE OF ATTORNEYS.

To the Clerk of the Above-entitled Court:

You will please enter our appearance as attorneys for William A. Marshall, Dep. Comr., U. S. Employees' Compensation Comm., in the above-entitled cause, and service of all subsequent papers, except writs and process, may be made upon said William A. Marshall by leaving the same with

ANTHONY SAVAGE, U. S. Attorney.

JOHN T. McCUTCHEON, Asst. U. S. Attorney. Office Address: 324 Federal Bldg., Tacoma, Wash.

[Indorsed]: Filed Jul. 8, 1929. [40]

NOTICE OF APPEARANCE OF ATTORNEYS.

To the Above-named Complainants and to Messrs.
Bogle, Bogle & Gates, Their Counsel:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the undersigned hereby enters appearance on behalf of the defendant, Martin Matheson, as his solicitor, and request that notice of all further proceedings be served upon him at his office below specified.

Dated at Tacoma, Washington, this 5th day of July, A. D. 1929.

WESLEY LLOYD,

Solicitor for Defendant Martin Matheson.

Office and P. O. Address: 527-532 Perkins Building, Tacoma, Washington.

[Indorsed]: Filed Jul. 5, 1929. [41]

MOTION AND AFFIDAVIT FOR INTER-
LOCUTORY INJUNCTION.

Come now the complainants, Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, by their solicitors, Bogle, Bogle & Gates, and move the Court for an interlocutory injunction, staying the payment of the amounts required by the compensation order and award of compensation referred to in the bill of complaint herein, pending the final decision

herein, on the ground and for the reason that irreparable damage would otherwise ensue to the complainants.

This motion is based upon the records and files herein, and upon the affidavit of Frank G. Taylor, Washington agent for the complainant, Occidental Indemnity Company, a corporation, hereto attached, and upon the verified bill of complaint on file herein.

BOGLE, BOGLE & GATES,
Solicitors for Complainants. [42]

United States of America,
State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says: That he is the Washington agent of the complainant, Occidental Indemnity Company, a corporation. That he has this day verified the bill of complaint, and by this reference makes the same a part hereof, as though fully set forth herein at length.

That the defendant, Martin Matheson, is insolvent, and if an interlocutory injunction is not issued herein staying the payment of the amounts required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payments will have to be made, and if the complainants herein are successful in this action, said payments cannot be recovered from the defendant Martin Matheson, and said com-

plainants will lose the benefits of any favorable decision herein. That by reason thereof said complainants will suffer irreparable damage.

FRANK G. TAYLOR.

Subscribed and sworn to before me this 2d day of July, 1929.

[Seal] STANLEY B. LONG,
Notary Public in and for the State of Wash-
ington, Residing at Seattle.

[Indorsed]: Filed Jul. 2, 1929. [43]

NOTICE OF HEARING (JULY 5, 1929).

To William A. Marshall, Deputy Commissioner Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and to Martin Matheson, Defendants:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the complainants herein will bring on for hearing before the above-entitled court at Tacoma, Washington, at ten o'clock A. M. on the 5th day of July, 1929, the hereto attached motion for interlocutory injunction herein.

BOGLE, BOGLE & GATES,
Solicitors for Complainants.

[Indorsed]: Filed Jul. 2, 1929. [44]

NOTICE OF HEARING (JULY 8, 1929).

To Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District Under the Longshoremen's and Harbor Workers' Compensation Act, and to Martin Matheson, Defendants, and Wesley Lloyd, Attorney for Martin Matheson:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that the complainants herein will bring on for hearing before the above-entitled court, at Tacoma, Washington, at 10:00 o'clock A. M. on Monday, July 8, 1929, the motion for interlocutory injunction herein, heretofore notice for hearing on the 5th day of July, 1929.

BOGLE, BOGLE & GATES,

Solicitors for Complainants.

[Indorsed]: Filed Jul. 9, 1929. [45]

MEMORANDUM DECISION ON COMPLAINANTS' APPLICATION FOR AN INTERLOCUTORY STAY OF COMPENSATION AWARD.

Filed July 13, 1929.

Complainants a carrier and its insurer under Sec. 21 of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1436; 33 U. S. C. A. Sec. 921) in their complaint ask that a compensa-

tion award of the Deputy Commissioner be set aside and that, pending final decision, the award be stayed.

The matter is now before the Court upon an application for such stay.

BOGLE, BOGLE & GATES, Central Bldg., Seattle, Wash., Solicitors for Complainants.

ANTHONY SAVAGE, U. S. Attorney, Seattle, Wash., JOHN T. McCUTCHEON, Asst. U. S. Attorney, Tacoma, Wash., Attorneys for Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under Longshoremen's and Harbor Workers' Compensation Act.

WESLEY LLOYD, 140 Perkins Building, Tacoma, Wash., Solicitor for Defendant, Martin Matheson.

Complainants Cite: Title 33, U. S. C. A., Sec. 908, Subdivision [46] f (1) and (2); Title 33 U. S. C. A., Sec. 921, subdivision b; *Indian River Steamboat Co. vs. East Coast Transportation Co.*, 10 So. 480, 487; 28 Fla. 387; 29 Am. St. Rep. 258; *Cause vs. Perkins*, 56 N. C. 177, 179; 69 Am. Dec. 728; *Deegan vs. Neville*, 29 So. 173, 175; 127 Ala. 471; 85 Am. St. Rep. 137; *Kerlin vs. West*, 4 N. J. Eq. (3 H. W. Green) 449; 4 Words and Phrases 3773; *Cleveland vs. Martin*, 75 N. E. 772, 777; 218 Ill. 73; 3 L. R. A. (N. S.) 629; *Devon vs. Pence*, (Ky.) 106 S. W. 874, 875; 32 C. J. 64.

Defendant, Matheson, cites: *Obrecht-Lynch Corporation vs. Clark*, 30 Fed. (2d) 144; *F. Jarka Co. vs. Monahan, etc.*, 29 Fed. (2d) 741; *Howard vs.*

Monahan, 31 Fed (2d) 480; Merchants' and Miners' Transportation Co. vs. Norton, 32 Fed. (2d) 513.

CUSHMAN, District Judge.—The findings of fact and award of the Deputy Commissioner are as follows:

* * * * *

“Such investigation in respect to the above-entitled claim having been made as is considered necessary, and hearings having been duly held in conformity with law, the Deputy Commissioner makes the following

FINDINGS OF FACT.

That on the 18th day of October, 1928, the claimant above named was in the employ of the employer above named at Tacoma in the State of Washington, in the Fourteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act; and that the liability of the employer for compensation under said Act was insured by Occidental Indemnity Company; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a longshoreman on board the steamship 'Point Reyes,' said steamship being then situated at [47] Tacoma, in the State of Washington; that while the claimant above named was so employed he stepped between some loose dunnage and the hatch coaming, wrenching his knee and resulting in his disability; that notice of injury was

given within thirty days after the date of such injury to the Deputy Commissioner and to the employer; that the employer furnished claimant with medical treatment, etc., in accordance with section 7 (a) of the said Act; that the average annual earnings of the claimant herein at the time of his injury amounted to the sum of \$1,829.54; that as a result of the injury sustained the claimant was wholly disabled from October 20, 1928, to April 12, 1929, inclusive, except for five days during which he continued his employment; that as a result of his injury claimant has a permanent partial disability equivalent to 40% of such disability as he would have sustained if he had lost his right leg, for which he is entitled to 115.2 weeks compensation; that the employer has paid \$563.04 to claimant as compensation.

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD.

That the employer, Northwestern Stevedoring Company, and the Insurance Carrier, Occidental Indemnity Company, shall pay to the claimant compensation as follows: 115.2 weeks at \$23.48 per week, amounting to the sum of \$2,702.59; that there is now due and payable to the claimant 33 weeks compensation at \$23.48 per week, amounting to the sum of \$774.18, and covering the period from October 18, 1928, to June 5, 1929, inclusive; that the employer shall have credit for \$563.04 previously paid to

claimant as compensation; that the remainder of compensation shall be paid to claimant by-weekly.”

* * * * *

The Deputy Commissioner and the injured long-shoreman are made parties defendant. The affidavit of Frank G. Taylor, Washington agent of the complainant Occidental Indemnity Company, to the effect that the injured defendant is insolvent is not disputed. It follows that denial of the stay, pending final determination, would irreparably injure the complainants if the injured defendant should be found, upon final decree, not entitled to any part of the amount awarded him.

It is the contention of complainants that the finding by the Deputy Commissioner of a 40% disability is unsupported by the evidence; that the evidence shows the existence of an [48] arthritic condition existing before the injury which arthritis was a partial disability; that while the evidence shows the injury aggravated the arthritis and resulted in an increased degree of disability, that there is no evidence that such increase exceeds 15% of the disability that would have been sustained by the loss of the leg.

If there is no evidence that the disability exceeds 15%, before this case would probably be tried and determined there would have been paid under the award an amount greater than properly allowable. Therefore, it will be assumed, with that fact made certain that complainants would sustain irreparable injury from a denial of the stay but the Court is

unable to find that such fact is made reasonably certain.

The only evidence as to the relative amount of disability to be attributed to the arthritis before the injury as distinguished from the arthritis as aggravated by the injury, expressed in percentages, is the opinion evidence of doctors and surgeons.

The Deputy Commissioner finds—the parties before him agreeing—that the average annual earnings of the claimant (longshoreman) at the time of his injury amounted to the sum of \$1,829.54. That this amount is substantially less than that earned by a longshoreman under no disability is not shown.

Of opinion evidence, it has been said:

“J. Weight of Opinion—1. In General. The weight to be given to opinion evidence in any given case is, within the bounds of reason, entirely a question for the determination of the jury, whether the inference or conclusion of an observer, or the judgment of an expert. The judgment of experts, even when unanimous and uncontroverted, is not necessarily conclusive on the jury and they may disregard it. The credibility of witnesses being a question for the jury in all [49] cases, the opinion of the expert, although upon the precise point to be passed upon by the jury, does not relieve them of the power and consequent responsibility of deciding, and they may believe a less technically trained set of witnesses. * * * ”

It is apparent that the Deputy Commissioner considered that the evidence of the actual amount being

earned by the claimant at the time of his injury outweighed the opinion evidence of the expert witnesses.

The Court is unable to say that in finding that claimant had suffered a 40% disability from the injury the Deputy Commissioner acted without evidence.

The stay prayed will be denied.

[Endorsed]: Filed Jul. 13, 1929. [50]

ORDER DENYING MOTION FOR INTER-
LOCUTORY INJUNCTION.

This matter having heretofore come on for hearing upon the motion of the complainants for an interlocutory injunction, the complainants being represented by their solicitors, Bogle, Bogle & Gates, and the defendant Wm. A. Marshall being represented by his solicitor, Anthony Savage, United States Attorney, and John T. McCutcheon, Assistant United States Attorney, and the defendant, Martin Matheson, being represented by his solicitor, Wesley Lloyd, and the Court having considered the bill of complaint on file herein and the affidavit in support of said motion and the memorandum briefs in connection therewith, and having heretofore entered a memorandum decision, now, therefore, it is

ORDERED, ADJUDGED AND DECREED that said motion for interlocutory injunction be, and the

same is hereby denied, to which complainants except, and their and each of their exceptions is hereby allowed.

Dated this 18th day of Sept., A. D. 1929.

EDWARD E. CUSHMAN,
District Judge.

[Endorsed]: Filed Sep. 18, 1929. [51]

PETITION FOR APPEAL.

To the Honorable EDWARD E. CUSHMAN, District Judge:

The above-named complainants, feeling aggrieved by the order denying motion for interlocutory injunction rendered and entered in the above-entitled cause on the 18th day of September, 1929, do hereby appeal from said order to the Circuit Court of Appeals for the 9th Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the 9th Circuit under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

NORTHWESTERN STEVEDORING
COMPANY.

OCCIDENTAL INDEMNITY COMPANY,
Claimants,

By BOGLE, BOGLE & GATES.

Their Solicitors. [52]

ORDER ALLOWING APPEAL AND FIXING
BOND.

Appeal allowed upon giving bond as required by law for the sum of \$2,000.00, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Done in open court this 14th day of October, 1929.

EDWARD E. CUSHMAN,

District Judge.

Please take notice of presentation at ten o'clock A. M. on October 14, 1929.

BOGLE, BOGLE & GATES,

Solicitors for Complainants.

Copy received this 14 day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,

Solicitors for Defendant Wm. A. Marshall, Deputy
Commissioner Fourteenth Compensation Dis-
trict Under Longshoremen's and Harbor
Workers' Compensation Act.

WESLEY LLOYD,

Solicitor for Defendant Martin Matheson.

[53]

[Indorsed]: Filed Oct. 14, 1929. [54]

ASSIGNMENT OF ERRORS.

Now comes the complainants in the above-entitled cause and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the order made by this Honorable Court on the 18th day of September, 1929:

1. That the United States District Court for the Western District of Washington, Southern Division, erred in entering said order denying complainants motion for an interlocutory injunction, on the ground and for the reason that it appears from the record herein that the defendant, Martin Matheson, is insolvent, and that, therefore, any payments made under the award pending the decision herein, if eventually favorable to the complainants, could not be recovered, and irreparable

damage would result to the complainants, and because said order is contrary to law.

WHEREFORE, the complainants and appellants pray that said decree be reversed, and that said District Court for [55] the Western District of Washington, Southern Division, be ordered to enter an order and decree reversing the decision and order of the lower court in said cause.

BOGLE, BOGLE & GATES,
Solicitors for Complainants and Appellants. [56]

Copy received this 14 day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,
Solicitors for Defendant Wm. A. Marshall, Deputy
Commissioner Fourteenth Compensation Dis-
trict Under Longshoremen's and Harbor
Workers' Compensation Act.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[Indorsed]: Filed Oct. 14, 1929. [57]

STATEMENT OF EVIDENCE TO BE IN-
CLUDED IN RECORD.

This cause came on for hearing before the Hon. Edward E. Cushman, Judge of the above-entitled court at Tacoma, Washington, on July 8, 1929, upon the motion of the complainants for an interlocutory injunction, said motion being considered

and heard upon the affidavit of Frank G. Taylor attached to said motion, and the verified bill of complaint on file herein, no testimony being offered by the defendants, said affidavit being as follows, to wit:

“United States of America,
State of Washington,
County of King,—ss.

Frank G. Taylor, being first duly sworn, on oath deposes and says: That he is the Washington agent of the complainant, Occidental Indemnity Company, a corporation. That he has this day verified the bill of complaint, and by this reference makes the same a part hereof, as though fully set forth herein at length.

That the defendant, Martin Matheson is insolvent, [58] and if an interlocutory injunction is not issued herein, staying the payment of the amounts required to be paid by the compensation order and award of compensation referred to in the bill of complaint herein, said payments will have to be made, and if the complainants herein are successful in this action, said payments cannot be recovered from the defendant, Martin Matheson, and said complainants will lose the benefits of any favorable decision herein. That by reason thereof said complainants will suffer irreparable damage.

FRANK C. TAYLOR.

Subscribed and sworn to before me this 2d day of July, 1929.

[Notarial Seal] STANLEY B. LONG,
Notary Public in and for the State of Washington,
Residing at Seattle.”

BOGLE, BOGLE & GATES,
Solicitors for Complainants.

To Solicitors for Defendants:

Please take notice of the lodgment of the foregoing statement of evidence to be included in record in the Clerk's office this 14 day of October, 1929, and the presentation thereof for approval to the Honorable Edward E. Cushman, the Judge who heard this cause at his courtroom in the Federal Building at Tacoma, Washington, on the 28 day of October, 1929, at ten o'clock A. M.

BOGLE, BOGLE & GATES,
Solicitors for Complainants. [59]

The foregoing statement of evidence to be included in the record being true, complete and properly prepared, is hereby approved and made a part of the record herein this 14 day of October, 1929.

EDWARD E. CUSHMAN,
District Judge.

Copy received and approved for entry October 14, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,

Solicitors for Defendant Wm. A. Marshall, Deputy
Commissioner Fourteenth Compensation Dis-
trict Under Longshoremen's and Harbor
Workers' Compensation Act.

WESLEY LLOYD,

Solicitor for Defendant Martin Matheson.

[Indorsed]: Filed Oct. 14, 1929. [60]

NOTICE OF APPEAL.

To WM. A. MARSHALL, Deputy Commissioner
Fourteenth Compensation District Under
Longshoremen's and Harbor Workers' Com-
pensation Act, Defendant, and ANTHONY
SAVAGE, U. S. Attorney, and JOHN T. Mc-
CUTCHEON, Asst. U. S. Attorney, His
Solicitors, and to *Defend* MARTIN MATHE-
SON and WESLEY LLOYD, His Solicitor:

NOTICE IS HEREBY GIVEN that the com-
plainants, Northwestern Stevedoring Company, a
corporation, and Occidental Indemnity Company, a
corporation, hereby appeal to the United States
Circuit Court of Appeals for the 9th Circuit from
the order denying their motion for an interlocu-
tory injunction, which said order was duly entered

herein on the 18th day of September, 1929, and from each and every part thereof.

NORTHWESTERN STEVEDORING
COMPANY.

OCCIDENTAL INDEMNITY COM-
PANY.

By BOGLE, BOGLE & GATES,

Their Solicitors. [61]

Copy received this 14th day of October, 1929.

ANTHONY SAVAGE,

JOHN T. McCUTCHEON,

Solicitors for Defendant Wm. A. Marshall, Deputy
Commissioner Fourteenth Compensation Dis-
trict Under Longshoremen's and Harbor
Workers' Compensation Act.

WESLEY LLOYD,

Solicitor for Defendant Martin Matheson.

[Indorsed]: Filed Oct. 14, 1929. [62]

CITATION ON APPEAL.

United States of America,—ss.

To WM. A. MARSHALL, Deputy Commissioner
Fourteenth Compensation District Under the
Longshoremen's and Harbor Workers' Com-
pensation Act, and MARTIN MATHESON,
Defendants and Appellees, GREETING:

You and each of you are hereby cited and ad-
monished to be and appear at the United States
Circuit Court of Appeals for the 9th Circuit in

the city of San Francisco, State of California, thirty days from and after the day this citation bears date pursuant to an order allowing an appeal filed and entered in the Clerk's office in the District Court of the United States for the Western District of Washington, Southern Division, from an order denying motion for interlocutory injunction, signed, filed and entered on the 18th day of September, 1929, in that certain suit being in Equity No. E.-393, wherein Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, are complainants and appellants, and you are defendants and appellees, to show cause, if any there be, why the order rendered against the said appellants as in said order allowing appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, United States District Judge for the Western District of Washington, Southern Division, this 14th day of October, 1929.

EDWARD E. CUSHMAN,
District Judge.

Copy received this 14 day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,

Solicitors for Defendant Wm. A. Marshall, Deputy
Commissioner Fourteenth Compensation Dis-
trict Under Longshoremen's and Harbor
Workers' Compensation Act.

WESLEY LLOYD,

Solicitor for Defendant Martin Matheson.

[63]

SUPERSEDEAS AND COST BOND ON AP-
PEAL.

KNOW ALL MEN BY THESE PRESENTS:
That we, Northwestern Stevedoring Company, a
corporation, and Occidental Indemnity Company, a
corporation, as principals, and United States Fi-
delity & Guaranty Co., a corporation, duly organ-
ized to transact a surety business in the State of
Washington, as surety, are held and firmly bound
unto Wm. A. Marshall, Deputy Commissioner Four-
teenth Compensation District under the Longshore-
men's and Harbor Workers' Compensation Act,
and Martin Matheson, defendants in the above-en-
titled cause, in the full sum of Two Thousand
(\$2,000.00) Dollars, lawful money of the United
States to be paid to them and their respective ex-
ecutors, administrators and successors, to which
payment well and truly to be made we bind our-
selves and each of us jointly and severally, and each

of our heirs, executors and administrators by these presents.

Sealed with our seals and dated this 16th day of October, 1929.

WHEREAS, the above-named principals have prosecuted an [64] appeal to the United States Circuit Court of Appeals for the 9th Circuit, to reverse the order of the District Court for the Western District of Washington, Southern Division, in the above-entitled cause made and entered on September 18, 1929, denying their motion for interlocutory injunction herein.

NOW, THEREFORE, the condition of this obligation is such that if the above-named principals shall prosecute their said appeal to effect and if they fail to make their plea good shall answer all costs and pay (without prejudice to the right, if any, thereafter to recover the same), all sums accrued and payable under the award of Wm. A. Marshall, Deputy Commissioner, Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, made and entered June 6, 1912, a copy of which said award is attached to the bill of complaint herein as Exhibit

'C,' then this obligation shall be void; otherwise to remain in full force and effect.

NORTHWESTERN STEVEDORING
COMPANY,

OCCIDENTAL INDEMNITY COMPANY,

By BOGLE, BOGLE & GATES,

LAWRENCE BOGLE,

Their Solicitors,

Principals.

[Seal]

UNITED STATES FIDELITY AND
GUARANTY CO.

By JOHN C. McCOLLISTER,

Its Attorney-in-fact,

Surety.

State of Washington,

County of King,—ss

On this 16th day of October, 1929, before me personally appeared Lawrence Bogle, to me known to be one of the solicitors for and on behalf of said corporations that executed the within and foregoing instrument as principals, and acknowledged the said instrument to be the free and voluntary act and deed of said corporations for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

[65]

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

EDWARD G. DOBRIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

State of Washington,
County of King,—ss.

On this 16 day of October, 1929, before me personally appeared John C. McCollister, to me known to be the attorney-in-fact of the corporation that executed the within and foregoing instrument as surety, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed thereto is the corporate seal of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year first above written.

EDWARD G. DOBRIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

The foregoing bond and the sufficiency of the surety thereon is approved as a cost bond and a supersedeas bond on appeal and all further proceedings herein be and the same are hereby stayed.

Dated this 16th day of October, 1929.

EDWARD E. CUSHMAN,
District Judge.

Copy received and approved for entry this 16th day of October, 1929.

ANTHONY SAVAGE,
JOHN T. McCUTCHEON,

Solicitors for Defendant Wm. A. Marshall, Deputy
Commissioner Fourteenth Compensation Dis-
trict Under Longshoremen's and Harbor Work-
ers' Compensation Act.

WESLEY LLOYD,
Solicitor for Defendant Martin Matheson.

[66]

[Indorsed]: Filed Oct. 17, 1929. [67]

PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare the record on appeal to the United States Circuit Court of Appeals for the 9th Circuit in the above cause to consist of all necessary papers, including the following:

1. Bill of complaint (with caption).
2. Appearance of defendant Wm. A. Marshall, etc.
3. Appearance of defendant Martin Matheson.
4. Motion and affidavit for interlocutory injunction.
5. Notice (hearing 5th day of July, 1929).

6. Notice (hearing July 8, 1929).
7. Memorandum decision on complainant's application for an interlocutory stay of compensation award.
8. Order denying motion for interlocutory injunction.
9. Petition for appeal.
10. Assignment of errors.
11. Statement of evidence to be included in record. [68]
12. Notice of appeal.
13. Citation on appeal.
14. Supersedeas and cost bond on appeal.
15. This praecipe.
16. Clerk's certificate.

You are requested, except on the bill of complaint, to omit all captions except the name of the paper and to transmit such record to the Clerk of said United States Circuit Court of Appeals for the 9th Circuit in the manner provided by law.

BOGLE, BOGLE & GATES,

Solicitors for Complainants and Appellants.

Copy received this 24th day of October, 1929.

ANTHONY SAVAGE,

JOHN T. McCUTCHEON,

Solicitors for Defendant and Appellee, Wm. A. Marshall, etc.

WESLEY LLOYD,

Solicitor for Defendant Martin Matheson.

[Endorsed]: Filed Oct. 24, 1929. [69]

CERTIFICATE OF CLERK U. S. DISTRICT
COURT TO TRANSCRIPT OF RECORD
ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify that the foregoing pages numbered from one to seventy inclusive are a full, true and correct copy of so much of the record and proceedings in the case of Northwestern Stevedoring Company, a corporation, and Occidental Indemnity Company, a corporation, complainants, against Wm. A. Marshall, Deputy Commissioner Fourteenth Compensation District under the Longshoremen's and Harbor Workers' Compensation Act, and Martin Matheson, Defendants, in Cause No. 393—Equity, in said District Court, as is required by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office at Tacoma in said District.

I further certify that I hereto attach and transmit the original citation in said cause with acceptance of service thereon.

I further certify that the following is a full, true and correct statement of all expenses, fees and charges incurred in my office on behalf of appellant herein for making the record, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit:

Clerk's Fees (Act Feb. 11, 1925) for making
record, certificate and return (115 fols.)

@ 15¢ ea.....	\$17.25
Appeal	5.00
Seal50

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed the seal of said District Court
at Tacoma, Washington, this 8th day of November,
A. D. 1929.

ED M. LAKIN,
Clerk.

By Alice Huggins,
Deputy Clerk. [70]

[Endorsed]: No. 5980. United States Circuit
Court of Appeals for the Ninth Circuit. North-
western Stevedoring Company, a Corporation, and
Occidental Indemnity Company, a Corporation, Ap-
pellants, vs. Wm. A. Marshall, Deputy Commis-
sioner, Fourteenth Compensation District, Under
the Longshoremen's and Harbor Workers' Compens-
ation Act, and Martin Matheson, Appellees. Tran-
script of Record. Upon Appeal from the United
States District Court for the Western District of
Washington, Southern Division.

Filed November 11, 1929.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.